ILE COPY

Office-Supreme Court, U.S.
FILED
OCT 7 1960
JAMES R. BROWNING, Clerk

No. 335

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMERCE-PACIFIC, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

MELVA M. GRANEY,
CAROLYN R. JUST,
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 335

COMMERCE-PACIFIC, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this case is whether bamboo shafts imported by petitioner from Japan are "fishing rods" within the meaning of that term in the pertinent excise tax provisions of the Internal Revenue Code of 1939 and 1954. The shafts are composed of sections fitted with ferrules or other means by which they may be joined together (R. 27). They are prepared and used for fishing purposes (R. 27), and they are included within the term "fishing tackle" as generally used in the sporting goods trade (R. 15).

Petitioner contends that its products are not fishing "rods," but fishing "poles," and that the tax on fishing "rods" is therefore not applicable. Both courts below held to the contrary, and their opinions (Pet. App. 2-16) fully answer petitioner's contention. In the ordinary meaning of language, a shaft that is composed of several sections that are joined together is a "rod" rather than a "pole"; the latter consists of a long single piece of wood. This distinction was relied on in an Internal Revenue ruling (Rev. Rul. 58-425, 1958—2 Cum. Bull 804) that the manufacturers' excise tax is not applicable to bamboo cane poles that have been merely straightened, scraped and varnished, but is applicable to jointed cane poles that are designed and manufactured for fishing purposes.

Neither of the grounds upon which petitioner challenges the decision below has merit. The lower courts did not, as petitioner contends (Pet. 9-10), refuse to consider "trade usage" allegedly showing that petitioner's poles are not considered to be "fishing rods." The court of appeals referred to such evidence (Pet. App. 11-12), but refused to give it the conclusive weight that petitioner ascribes to it because the plain meaning of the statute is to the contrary. There is therefore no conflict "in principle" (Pet. 9) with *White* v. *Aronson*, 302 U.S. 16, where the Court relied on trade usage in holding that an excise tax on "games" did not apply to jigsaw picture puzzles.

Nor is the fact that the Customs Court has held that, for purposes of the Tariff Act, similar poles were not "fishing rods" but "fishing tackle," in any

way inconsistent with the holding below that they are "fishing rods" under the excise tax provisions here involved. For, as the court below pointed out (Pet. App. 14, 15), the Tariff Act "differs in form and substance" from the excise tax statute involved here, since it divides the general category of fishing tackle into two categories on both of which a tariff is imposed but at different rates. The excise tax, however, merely includes, as one category of sporting equipment, "fishing rods * * *." Moreover, as the court noted (Pet. App. 15), the articles before the Customs Court "were essentially different" from the articles involved here. The circumstances are such, therefore, as to call for application of the principle, recognized by petitioner (Pet. 10), that the construction placed on words used in one statute is not necessarily controlling in the interpretation of the same words in another statute. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150.

The decision below is correct, and no conflict of decisions or important question is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MELVA M. GRANEY,
CAROLYN R. JUST,
Attorneys.

OCTOBER, 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 586781 391